IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 837 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VINUBHAI DEVJIBHAI YADAV ...Petitioner

Versus

BHIKHABHAI KURAJIBHAI SADADIYA
AND 3 ORS. ...Respondents.

Appearance:
MR VIJAY H PATEL for Petitioner
MR TUSHAR MEHTA for Respondent No. 1
MR SUDHANSHU PATEL A.G.P. for Respondent No. 2
MR YF MEHTA for Respondent No. 3
MR DD VYAS for Respondent No. 4

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 05/09/2000

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner prays for issuance

of a Writ of Mandamus or any other appropriate Writ quashing and setting aside the order dtd. 27th December, 1995, passed by the Additional Chief Secretary, Government of Gujarat declaring the petitioner disqualified under the provisions of the Gujarat Provision for Disqualifications of Members of Local Authorities for Defection Act, 1986 (for short "the Act").

2. The facts which led the petitioner to prefer this petition may in brief be stated. A notification dt.2/5/1995 for holding the election of Jasdan Taluka Panchayat on 11/6/1995 was issued. The petitioner filed his nomination form for the Kanpar-Pipaliya Constituency, stating that he was to contest the election under the aegis of the Indian National Congress. He, therefore, prayed for the allotment of a symbol namely "Palm" which is the party's symbol for the purpose of contesting the election. Other six persons had also filed their nomination forms stating that they were set up as the candidates by the Indian National Congress. Later-on, within the time prescribed they all withdrew their candidature qua the said Constituency. No other candidate also remained in the battle. The petitioner, who remained the only contesting member, was declared elected uncontested by the respondent No.3, the Returning Officer, under Rule 22 of the Gujarat Panchayat Election Rules, 1994. After the election was over and other candidates were declared elected, the first meeting of the elected members of the Panchayat for the election of the President and Vice President was held on 14th July, 1995. In that meeting, the petitioner voted in favour of the candidates set up by the Bhartiya Janata Party (B.J.P.) for the posts of the President and Vice President. The respondent No.1, therefore, under Rule 6 of the Gujarat Provision for disqualification of members of Local Authorities for Defection Rules, 1987 (for short "the Rules) filed the application No.10 of 1995 before the Additional Chief Secretary and designated officer under the Act, alleging that when the petitioner was elected under the aegis of the Indian National Congress, it was not just and legal for him to vote in favour of the candidate set up by the Bhartiya Janata Party. He had, thereby disregarding the whip given by the Indian National Congress, made himself, becoming the defector, disqualified for being continued as the member of the Panchayat.

3. On being served with the notice, the petitioner appeared before the Additional Chief Secretary to the Government of Gujarat, Social Welfare Department, and in

defence put-forth his case. According to him he was in fact not set up as the candidate by the Indian National Congress though he wanted to be so. When he was declared elected, he was treated to be the independent candidate and was also elected, as the independent candidate belonging to no political party. He was, therefore, free to vote in favour of the candidate who according to him was in all respects fit for the posts of President and Vice President. He was not bound to follow the whip of the Indian National Congress. He had not, therefore, defected, and committed the wrong as alleged. The provisions of the Act, therefore, could not be invoked against him. The application filed against him being devoid of merits was liable to be rejected etc.

4. Hearing the concerned parties, the Additional Chief Secretary to the Government of Gujarat, Social Welfare Department on 27th December, 1995 passed the order in question under Sec.6 of the Act declaring that the petitioner had made himself disqualified under Sec.3(1)(b) of the Act holding that he having been elected as the candidate set up by the Indian National Congress was bound to esteem the whip given, instead that he had voting contrary to it flouted the same, made himself the defector, and incurred disqualification. It was also found that as per clause (b) of Sub-Section (1) of Sec.(3) of the Act, the petitioner had not obtained prior permission from the party to vote contrary to the direction given, and his such voting was also not condoned by the Indian National Congress; and so it seems the authority found no ground to take a different view. Being aggrieved by the order, the petitioner has, brought the said order under challenge preferring this application under Article 226 of the Constitution of India.

5. According to the petitioner, the impugned order is bad in law. He wanted to contest the election as the candidate sponsored by the Indian National Congress, but authorised letter in his favour was not issued till he was declared elected uncontested. As there was no letter of authorization from the Indian National Congress, the symbol of Indian National Congress was also not allotted to him. He should, therefore be deemed to have been elected as the independent candidate. The authority ought to have borne in mind that the whip of the party could never be for the independent members, it could be for those elected under the aegis of the party. If the Indian National Congress had given the whip, he having been elected as the independent member was not bound to take a note of it. No whip thus could be said to have

been given to him. He was free to vote as per his choice and without any fetter. He could not, therefore, be said to have flouted the whip, in fact, there was no cause to declare him disqualified under the Act. While passing the order, the authority did not consider the relevant provisions and the facts before him in right perspective, and mechanically passed the order under the assumption and mistaken impression.

6. The Defectors cause irreparable damage to the public good and democratic values. They machinate, feather their own nest, and upset the applecart when everything is going very well and leave the people in the lurch. The Court has, therefore, to frown upon the defectors and maintain the order passed to curb defection. Such is the submission made by the learned advocate Mr. Sheth for the respondent No.1. Likewise submissions are made by the learned advocates for respondents Nos.2 and 4.

7. It is the admitted facts that the petitioner on 9/5/1995 in order to contest the election as the member of the Indian National Congress filed his nomination paper, in anticipation of getting the authorization letter in due course, but of course before the requisite stage. On that day, however, the Indian National Congress did not issue any letter of authorization. As other candidates who had filed their nomination forms under the banner of the same party for contesting the election qua the same Constituency withdrew the forms, the petitioner alone remained in the fray. He was, therefore, declared elected uncontested on 15/5/1995. After he was declared elected, the Returning Officer on the same day i.e. on 15/5/1995 received the letter of authorization dtd. 12/5/1995 from the Indian National Congress intimating that the petitioner was the member set up by it to contest the election. The point that now arises for consideration is whether in view of such facts, the candidate who is declared elected can be said to have been elected as the independent member or as the member sponsored by the Indian National Congress.

8. As per the applicable statutory provisions or the rules framed under the statute, the candidate contesting the election as the member of a particular political party has, within the time prescribed, and at or before a particular stage of election process, to show to the satisfaction of the Returning Office that he has been set up for the election by the particular political party; and that is to be done by presenting the letter of authorization from the said political party. In the

absence of any statutory provisions or the Rules applicable regarding the time or stage for the tender of the authorization letter, the candidate has to tender the same along with the nomination form, for taking further appropriate action by the Returning Officer promptly or subsequently at different stages following in succession, otherwise regardless of his representation or statement made in his nomination form, he should, in case his nomination form is accepted as valid, be treated to be the independent member, sponsored by no political party; and question of allotment of party's symbol then will not arise; but if necessary, one of the symbols not reserved for any of the political parties has to be allotted. If such candidate is then elected, he will not assume the characteristics of a party's candidate and the authorization letter received after the expiry of the prescribed time or cessation of the particular stage in that regard, will be of no value. To put in other-words, receipt of the letter of authorization from the party by the Returning Officer after the stage for tender has by-gone will not change the candidate's category of his becoming the independent member that has come into being for all the purposes. Such candidate is then not subject to any direction, or whip or dictation, or Constitution or Rules of the party; and not obliged to comply with the same.

9. As stated above, the letter of authorization of the party sponsoring the candidate is to be filed in the real earnest for further necessary action by the Returning Officer and making voters, parties, and other candidates, as well as other concerned persons or officers with the election to know the emerging picture for their future course of action. At this state, Rule 15 of the Gujarat Municipalities (Conduct of Election) Rules, 1994 and especially the explanation being the guiding force cannot be lost the sight of. The relevant portion thereof may be quoted;

"Rule-15. Symbols to contesting candidates.-

(1) The State Election Commissions shall, by notification in the official gazette, specify the symbols xxx xxx xxx xxx xxx xxx xxx xxx xxx

(2) xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx

(3) For the candidates set up by a

party which is a recognized political party in the State of Gujarat under the Election Symbols (Reservation and Allotment) Order, 1968 the returning officer shall allot the symbol reserved for that party under the said order.

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Explanation : To be considered a candidate set up by a recognized political party, a candidate should produce a letter to that effect signed by the president of the state unit of that party in Gujarat or any person authorized by him in this behalf before the last date for withdrawal of nominations specified in rule 11 is over.

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Admittedly, in the case on hand alike Rule 15, there is no provision either in the Act, or in the Rules, or in the Gujarat Panchayats Act, 1993 or in the Gujarat Panchayats Elections Rules, 1994, framed under the Gujarat Panchayats Act, directing when or at what stage of election process the letter of authorization of the political party, must be filed for recognition and further course of action. Nomination paper in prescribed form as per Rule 12(1) of the Gujarat Panchayats Elections Rules, 1994, is to be presented by the person desirous of contesting the election. The format of nomination paper is given vide Form - 4 which can be found at the end of the Rules. As per the said form, the candidate has to mention by which party he is sponsored if at all he is; but about the presentation of authorization letter for recognition, the form is silent on the issue. That form is, therefore, of no help. When that is so the letter of authorization from the Indian National Congress as stated above, ought to have been, in

this case, filed along with the nomination paper so as to make it known to the Returning Officer, Voters and the concerned parties and others that he was the member set up for the election by the Indian National Congress and was entitled to the allotment of the party's symbol, viz. "Palm". Accordingly when letter of authorization was not tendered, regardless of the statement made by the petitioner, his candidature must be treated to be independent and not sponsored by the Indian National Congress. Subsequently, after his being elected, in spite of issuance of the letter of authorization by the Indian National Congress, and the receipt thereof by the Returning Officer, the petitioner did not assume the characteristic of the Congress Party's candidate; and so he was not bound by the party's direction or dictation, or whip. In this case, therefore, when the petitioner having been declared elected uncontested, assumed for all purposes the characteristics of the independent member, and not of the member set up by the Indian National Congress, and so he was free to vote in favour of that candidate, who was in his view and assessment, most fit for the post of President or the Vice President; and in whose favour his voters' (sovereign) will and desire or expectations, the paramount consideration, being dominating or guiding force in democracy for every elected representative were tilting or leaning. In view of the matter, his act of voting in favour of B.J.P.'s candidate cannot be construed to be the breach of the whip given by the Indian National Congress rendering him the defector. In such facts and circumstances, the petitioner cannot be said to have incurred the disqualification under the Act. The authority has, overlooking this relevant and material aspect of the case, fallen into the error of law, in passing the order.

10. Explanation (1)(a) to Sec.3 of the Act runs as under ;

> 3. Disqualification on the ground of defection.-
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> (1) xxx xxx xxx xxx
>
> (a) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> "Explanation :- (1) For the purpose of this section.-

(a) a person elected as the councillor or, as the case may be, a member shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such councillor or member,"

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Pointing out the said provision, Mr. Sheth, the learned advocate for the respondent No.1 contends that the petitioner in view of this provision can be said to be the elected member belonging to Indian National Congress making it clear that no other provision in the Act & Rules will come into play, and when he voted contrary to the whip given, he was rightly held to be the disqualified member being the defector. I cannot set my seal on the contention advanced. To which political party the candidate after being elected would be deemed to belong to is made clear. As per that provision, the elected candidate would belong to that party by which he was set up as the candidate for the election. Hence setting the person as candidate for election by a particular party at a particular stage after the notification for holding election is issued is the decisive factor and not the act done or attempt made by the political party or the candidate at any other stage or even at the stage after being elected for a particular or specific recognition. The words "set-up" and "for election" appearing in the explanation quoted above connote the same meaning. When the candidate can be said to have been set up for the election by the particular party as its member is made clear hereinabove. As per such law, in the case on hand the petitioner was not set up as the candidate for election by the Indian National Congress. The subsequent act or attempt on the part of the Indian National Congress of sending the letter of authorization cannot be said to have conferred a recognition that the petitioner was deemed to belong to the Indian National Congress. Consequently, it cannot be said that the petitioner by voting contrary to the whip of the party, incurred the disqualification on the ground of defection as contended. The contention therefore fails.

11. Defection, just for the lure of office, or money, or both, or for some design or coup, being the treachery, unethical conduct, mischief as well as political impropriety, immensely injurious to and gnawing at & nibbling out the larger good, stability, security, purity and progress, is certainly the egregious & worst form of evil, leading to and fuelling several crises, scams, abuse of power, subversion, deception, ruse, retrogression, despicable cataclysm, encouragement to defiling forces, cabal, corruption, and downfall of mechanism adopted for healthy governance in all spheres, public administration, democracy and its values, as well as dragging to irreversible repercussions & consequences, and breeding the jungle law exterminating everything that is good must no doubt, as rightly submitted by the learned advocate Mr. Sheth, be frowned upon and curbed. In the case on hand, however, for the reasons stated above, there being no defection; and the order passed in that regard being unjust, unreasonable & arbitrary; as well as the result of incorrect interpretation of law cannot be maintained. For the protection of the legal right of the petitioner the impugned order on the contrary is liable to be quashed and set aside.

12. For the aforesaid reasons, this application is allowed. The order dtd. 27th December, 1995, (Copy of which is produced at Annexure-C), passed by the Additional Chief Secretary, Government of Gujarat, declaring the petitioner to be the disqualified member under the Act, is hereby quashed and set aside. Rule accordingly made absolute.

13. The Registrar of this Court is directed to inform the respondent No.3 about this order by fax at the cost of the petitioner.

14. At this stage, Mr.Sheth, the learned advocate for the respondent No.1 prays for staying the operation of the final order as the petitioner is likely to move the higher Forum. During the pendency of the petition, no stay was granted. Further, the present term is over and fresh election is declared; and process thereof has commenced. There is, therefore, no justifiable reason to grant stay. The prayer for the stay is refused.

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